

SODOMY THIRD DEGREE
(E Felony)
(Lack of Consent - Totality of Circumstances)
PENAL LAW 130.40(3)
(Committed on or after February 1, 2001)

The _____ count is Sodomy in the Third Degree.

Under our law, a person is guilty of Sodomy in the Third Degree, when he or she engages in deviate sexual intercourse with another person without such person's consent.¹

Some of the terms used in this definition have their own special meaning in our law. I will now give you the meaning of the following terms: "deviate sexual intercourse" and "without such person's consent."

DEVIATE SEXUAL INTERCOURSE means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.²

A person engages in deviate sexual intercourse with another person WITHOUT SUCH PERSON'S CONSENT when there is a lack of consent to the act.

Lack of consent results from circumstances under which, at the time of the act of deviate sexual intercourse, the complainant clearly expressed that he or she did not consent to

¹ At this point, the statutory definition continues: "where such lack of consent is by reason of some factor other than incapacity to consent." There are two such factors, forcible compulsion [Penal Law § 130.05(2) (a)] and the conduct set forth in Penal Law § 130.05(2)(d). The latter factor is the focus of this charge and that is set forth in the definition of the term "without such person's consent." If "forcible compulsion" is the charged conduct, adapt the charge provided for sodomy in the first degree by forcible compulsion.

² Penal Law § 130.00(2). For the definition of "not married," see Penal Law § 130.00(4).

engage in such act, and a reasonable person in the actor's situation would have understood the complainant's words and acts as an expression of lack of consent to such act under all the circumstances.³

In order for you to find the defendant guilty of this crime, the People are required to prove, from all the evidence in the case, beyond a reasonable doubt, both of the following two elements:

1. That on or about (date), in the county of (county) the defendant (defendant's name), engaged in deviate sexual intercourse with (complainant's name); and,
2. That the defendant did so without (complainant's name) consent.

Therefore, if you find that the People have proven beyond a reasonable doubt, both of those elements, you must find the defendant guilty of the crime of Sodomy in the Third Degree as charged in the _____ count.

On the other hand, if you find that the People have not proven beyond a reasonable doubt either one or more of those elements, then you must find the defendant not guilty of the crime of Sodomy in the Third Degree as charged in the _____ count.

³See Penal Law §130.05(2)(d).